

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ERIKA ANN TERWISSCHA,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. CV-12-3121-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT is Plaintiff Erika Ann TerWisscha's (Plaintiff's) Motion for Summary Judgment, ECF No. 16, and the Commissioner of Social Security's (Defendant's) Motion for Remand and Further Administrative Proceedings, ECF No. 24. Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Lars J. Nelson represents Defendant. The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **GRANTS** Defendant's Motion for Remand; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for a period of disability and Disability Insurance Benefits on July 23, 2008, alleging disability since January 1, 2001, Tr. 65, due to gastroparesis, Tr. 75. At the administrative hearing, Plaintiff revised her

1 alleged onset date to January 1, 2002. Tr. 419-420. The application was denied
2 initially and upon reconsideration. Administrative Law Judge (ALJ) Marie
3 Palachuk held a hearing on June 15, 2010, Tr. 407-438, and issued an unfavorable
4 decision on July 8, 2010, Tr. 15-21. The Appeals Council denied review on
5 August 21, 2012. Tr. 5-10. The ALJ's January 2011 decision became the final
6 decision of the Commissioner, which is appealable to the district court pursuant to
7 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on October 4,
8 2012. ECF No. 1, 5.

9 **STATEMENT OF FACTS**

10 The facts of the case are set forth in the administrative hearing transcript, the
11 ALJ's decision, and the briefs of the parties. They are only briefly summarized
12 here.

13 Plaintiff was born on May 23, 1967, and was 34 years old on the alleged
14 onset date, January 1, 2002. Tr. 65, 419-420. She completed high school, but has
15 taken no college or trade school classes. Tr. 430, 169. Plaintiff testified at the
16 administrative hearing that in 2002 she was vomiting frequently, had spells of
17 diarrhea and had constant cramping pain in her stomach. Tr. 423. She stated she
18 has had about 50 hospital visits and 15 doctor visits a year since 2002. Tr. 426.
19 Plaintiff indicated she last worked in 2002 and 2003 cleaning an office once a
20 week and as a clerk at a JC Penney Department Store for about a week and a half.
21 Tr. 428. She stated she stopped working because she ended up going to the
22 hospital and was not well enough to work. Tr. 428.

23 Plaintiff's husband, Roger TerWisscha also testified at the administrative
24 hearing. Tr. 430-433. He stated Plaintiff's health was fine in January 2001, but
25 she then started having problems with rectal bleeding in the fall of 2001. Tr. 431.
26 He indicated he remembers Plaintiff's health was really bad in September 2001
27 and that her condition remained poor, with constant bouts of vomiting and
28 diarrhea, until she had a gastric pacemaker put in. Tr. 431-432.

1 Sergio Bello, M.D., testified as a medical expert at the administrative
2 hearing. Tr. 412-422. Dr. Bello indicated Plaintiff's gastroparesis condition was
3 initially "at a low level but it's been a progressive problem." Tr. 415. He stated
4 Plaintiff's condition worsened much later than 2002 and became a medically
5 determinable severe impairment starting around 2004 or 2005. Tr. 415. Dr. Bello
6 testified he could not "say with certainty" that Plaintiff had any limitations prior to
7 September 2002. Tr. 416. It was noted Plaintiff had a gastric pacemaker put in in
8 2004, Tr. 417, and Dr. Bello opined that was the point in time (2004) when
9 Plaintiff's gastroparesis had started to get worse, Tr. 418.

10 When Plaintiff's counsel asked Dr. Bello about Dr. Halma's October 12,
11 2009 medical report, which indicates Plaintiff would miss four or more days of
12 work per month, Tr. 328-329, Dr. Bello initially indicated he did not see the level
13 of frequency or severity in the record to support Dr. Halma's opinion. Tr. 419.
14 Upon further questioning, Dr. Bello answered "that is correct, yes" to Plaintiff's
15 attorney's question of whether Dr. Bello would concur with the physician's
16 opinion that "since 2002" Plaintiff would miss four or more days of work per
17 month. Tr. 421.

18 ADMINISTRATIVE DECISION

19 The ALJ indicated Plaintiff was insured only through September 30, 2002.
20 Tr. 15, 17. In order to be eligible for a period of disability and DIB, Plaintiff thus
21 had to establish disability prior to September 30, 2002. *Id.* Consequently, the
22 relevant time period in this case, January 1, 2002 (the alleged onset date), to
23 September 30, 2002 (the date last insured), is fairly narrow.

24 The ALJ found that Plaintiff did not engage in substantial gainful activity
25 during that relevant time period. Tr. 17. The ALJ determined, at step two, that
26 Plaintiff had a severe impairment of gastroparesis/irritable bowel
27 syndrome/ulcerative colitis during the relevant time period. Tr. 17. At step three,
28 the ALJ found Plaintiff's severe impairment did not meet or medically equal a

1 listed impairment during the relevant time period. Tr. 18. The ALJ assessed
2 Plaintiff's RFC and determined that, during the relevant time period, Plaintiff
3 could perform light exertion level work with limitations for only occasional
4 postural manipulations (i.e., bending, twisting, stooping, kneeling, crouching,
5 balancing, etc.). Tr. 18.

6 At step four, the ALJ concluded that Plaintiff was able to perform her past
7 relevant work as a sales clerk, bartender, waitress, and cashier. Tr. 20. In the
8 alternative, the ALJ determined at step five that there were other jobs that existed
9 in significant numbers in the national economy that Plaintiff could have also
10 performed. Tr. 20-21. The ALJ thus determined that Plaintiff was not under a
11 disability within the meaning of the Social Security Act at any time from January
12 1, 2002, the alleged onset date, through the date last insured, September 30, 2002.
13 Tr. 21.

14 STANDARD OF REVIEW

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the Court set
16 out the standard of review:

17 A district court's order upholding the Commissioner's denial of benefits is
18 reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The
19 decision of the Commissioner may be reversed only if it is not supported by
20 substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d
21 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a
22 mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way,
23 substantial evidence is such relevant evidence as a reasonable mind might accept
24 as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401
25 (1971). If the evidence is susceptible to more than one rational interpretation, the
26 Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180
27 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599
28 (9th Cir. 1999).

1 The ALJ is responsible for determining credibility, resolving conflicts in
 2 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
 3 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,
 4 although deference is owed to a reasonable construction of the applicable statutes.
 5 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

6 It is the role of the trier of fact, not this Court, to resolve conflicts in
 7 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
 8 rational interpretation, the Court may not substitute its judgment for that of the
 9 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 10 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will
 11 still be set aside if the proper legal standards were not applied in weighing the
 12 evidence and making the decision. *Browner v. Secretary of Health and Human*
 13 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to
 14 support the administrative findings, or if conflicting evidence exists that will
 15 support a finding of either disability or non-disability, the Commissioner's
 16 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
 17 Cir. 1987).

18 SEQUENTIAL EVALUATION PROCESS

19 The Commissioner has established a five-step sequential evaluation process
 20 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 21 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 22 through four, the burden of proof rests upon the claimant to establish a prima facie
 23 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 24 burden is met once a claimant establishes that a physical or mental impairment
 25 prevents him from engaging in his previous occupation. 20 C.F.R. §§
 26 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
 27 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
 28 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist

1 in the national economy which claimant can perform. *Batson v. Commissioner of*
 2 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make
 3 an adjustment to other work in the national economy, a finding of “disabled” is
 4 made. 20 C.F.R. §§ 404.1520(a)(4)(i-v), 416.920(a)(4)(i-v).

5 ISSUES

6 The question presented is whether substantial evidence exists to support the
 7 ALJ’s decision denying benefits and, if so, whether that decision is based on
 8 proper legal standards.

9 Plaintiff contends the ALJ erred by (1) improperly rejecting the opinion of
 10 Dr. Halma; (2) improperly rejecting the opinion of Drs. Brown and
 11 Boonpongmanee; and (3) improperly rejecting Plaintiff’s subjective complaints.
 12 ECF No. 16 at 13. Defendant concedes that Dr. Halma’s opinion should be
 13 reconsidered on remand in light of Dr. Bello’s ambiguous testimony and that the
 14 ALJ erred by failing to provide valid reasons for discounting Plaintiff’s credibility.
 15 ECF No. 24 at 5-9. Defendant, however, believes the ALJ provided appropriate
 16 rationale for discounting the opinions of Drs. Brown and Boonpongmanee. ECF
 17 No. 24 at 10-15. Defendant requests that the Court remand the matter for
 18 additional proceedings. ECF No. 24. Plaintiff’s reply brief asserts that given the
 19 opinions of Drs. Halma, Bello and Brown, in conjunction with the testimony of the
 20 vocational expert, the case should be remanded for an immediate award of
 21 benefits. ECF No. 26.

22 DISCUSSION

23 A. Dr. Halma’s October 12, 2009 Report

24 Plaintiff contends the ALJ committed reversible error by improperly
 25 rejecting Dr. Halma’s October 12, 2009 report. ECF No. 16 at 14-15, 17-18.
 26 Defendant argues that remand for further administrative proceedings is appropriate
 27 for the ALJ to resolve ambiguity and apparent conflict between the opinions of
 28 Drs. Halma and Bello. ECF No. 24 at 5-7.

1 As noted above, because Plaintiff was insured only through September 30,
2 2002, Plaintiff must establish disability prior to September 30, 2002, in order to be
3 eligible for a period of disability and DIB. At the administrative hearing, Dr. Bello
4 testified that Plaintiff's condition worsened much later than 2002 and became a
5 medically determinable severe impairment starting around 2004 or 2005, two or
6 three years after the relevant time period in this case. Tr. 415. Dr. Bello testified
7 he could not "say with certainty" that Plaintiff had any limitations prior to
8 September 2002. Tr. 416.

9 On October 12, 2009, seven years after the relevant time period, Dr. Halma
10 filled out a "medical report" on behalf of Plaintiff. Tr. 328-329. The report
11 indicates Dr. Halma had treated Plaintiff since 2001 for her gastroparesis,
12 pulmonary fibrosis, ARDS, ulcerative colitis and reactive depression, and that the
13 limitations assessed in the report had existed since January 2002. Tr. 328-329. Dr.
14 Halma noted on this October 2009 report that Plaintiff would miss work due to
15 medical impairments "4 or more days per month" if she "were **currently**
16 attempting to work a 40-hour per week schedule." Tr. 329 (emphasis added).

17 The undersigned finds it is unclear whether Dr. Halma's October 2009
18 report addresses Plaintiff's condition during the relevant time period in this case.
19 The October 2009 report asks if Plaintiff would miss work due to medical
20 impairments if she "were currently attempting to work a 40-hour per week
21 schedule." Tr. 329. It does not specifically ask whether Plaintiff would have
22 missed work due to medical impairments between January 1, 2002 and September
23 30, 2002. The undersigned is not convinced this "medical report" is probative
24 evidence of Plaintiff's condition during the relevant time period.

25 When asked about Dr. Halma's October 2009 report, Dr. Bello initially
26 indicated he did not see the level of frequency or severity in the record to support
27 Dr. Halma's opinion. Tr. 419. Upon further questioning, Dr. Bello answered "that
28 is correct, yes" to Plaintiff's attorney's question of whether Dr. Bello would concur

1 with Dr. Halma's opinion that "since 2002" Plaintiff would miss four or more days
 2 of work per month. Tr. 421. Again, the undersigned is not persuaded that Dr.
 3 Halma's October 2009 report indicates Plaintiff would have missed four or more
 4 days of work per month due to medical impairments in 2002.

5 While Dr. Halma apparently treated Plaintiff in the early 2000's, there are no
 6 medical records from Dr. Halma or other medical professionals from the relevant
 7 time period to substantiate the level of limitation Plaintiff's counsel would lead us
 8 to believe Dr. Halma assessed on the October 2009 report. Clearly, there is
 9 ambiguity in the report, as well as the hearing testimony of Dr. Bello, which needs
 10 further review.

11 The undersigned finds that Plaintiff's condition and residual functional
 12 capacity during the relevant time period should be reassessed on remand. On
 13 remand, the ALJ shall reconsider Dr. Halma's October 2009 report and, if deemed
 14 necessary, contact Dr. Halma to determine whether it is Dr. Halma's opinion that
 15 Plaintiff would have missed four or more days of work per month due to medical
 16 impairments **during the relevant time period.**¹

17 **B. Plaintiff's Credibility**

18 Defendant admits the ALJ erred by failing to provide adequate rationale for
 19 discounting Plaintiff's subjective complaints in this case. ECF No. 24 at 7.

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21
 22 ¹In Social Security cases, the ALJ has a special duty to develop the record
 23 fully and fairly and to ensure the claimant's interests are considered, even when the
 24 claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150
 25 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). An ALJ's
 26 duty to develop the record is triggered only when there is ambiguous evidence or
 27 when the record is inadequate to allow for proper evaluation of the evidence.
 28 *Tonapetyan*, 242 F.3d at 1150.

1 It is the province of the ALJ to make credibility determinations. *Andrews v.*
2 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
3 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
4 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
5 medical impairment, the ALJ may not discredit testimony as to the severity of an
6 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157
7 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the
8 ALJ's reasons for rejecting the claimant's testimony must be "clear and
9 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
10 findings are insufficient: rather the ALJ must identify what testimony is not
11 credible and what evidence undermines the claimant's complaints." *Lester*, 81
12 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

13 In this case, the ALJ merely stated she found Plaintiff's medically
14 determinable impairments could reasonably be expected to cause the alleged
15 symptoms; however, Plaintiff's statements concerning the intensity, persistence
16 and limiting effects of the symptoms were not credible to the extent they were
17 inconsistent with the ALJ's RFC assessment. Tr. 20. The ALJ did not discuss the
18 content of Plaintiff's testimony and failed to identify specific evidence which
19 undermined Plaintiff's claims. Accordingly, the undersigned finds Plaintiff's
20 subjective complaints were improperly rejected by the ALJ in this case. On
21 remand, Plaintiff's credibility shall be reconsidered, and the ALJ shall provide an
22 explanation for the weight accorded to Plaintiff's statements.

23 **C. Drs. Brown and Boonpongmanee**

24 Plaintiff also argues the ALJ provided invalid reason for rejecting the
25 opinions of Drs. Brown and Boonpongmanee. ECF No. 16 at 18-19. Defendant
26 does not concede that the ALJ erred in weighing the opinions of these physicians.
27 ECF No. 24 at 10-15.

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1 On the same type of form “medical report” Dr. Halma completed in October
2 2009, Timothy Brown, M.D., indicated in either October 2005 or October 2009,²
3 that if Plaintiff were “currently” attempting to work a 40-hour per week schedule,
4 she would miss work due to medical impairments four or more days per month.
5 Tr. 334. Dr. Brown did not indicate on the form how long Plaintiff’s symptoms
6 had existed. Tr. 334. In November 2003, Somprak Boonpongmanee, M.D.,
7 treated Plaintiff for persistent nausea and vomiting. Tr. 316-321. Dr.
8 Boonpongmanee’s records indicate Plaintiff was being treated for gastroparesis,
9 was receiving Botox injections to treat the condition, and was awaiting further
10 treatment. *Id.*

11 Neither physician describes Plaintiff’s condition or functioning ability
12 during the relevant time period in this case; therefore, the probative value of their
13 medical reports is limited. Nevertheless, for the reasons discussed above, the
14 undersigned has determined a remand for additional proceedings is appropriate in
15 this case. On remand, the ALJ shall additionally reconsider the opinions of Drs.
16 Brown and Boonpongmanee, as well as all medical evidence of record, and give
17 those opinions whatever weight, if any, the ALJ deems appropriate.

18 CONCLUSION

19 Having reviewed the record and the ALJ’s conclusions, the undersigned
20 finds the ALJ’s decision is not based upon the proper legal standards and is not
21 supported by substantial evidence in the record. The Court has the discretion to
22

23 ²Due to the physician’s handwriting, it is difficult to discern the date of this
24 report. While the undersigned believes the report is dated by Dr. Brown as
25 October 13, 2009, Plaintiff’s counsel cites the report as an October 13, 2005
26 document, ECF No. 16 at 18. Defendant cites the report as being signed in 2009.
27 ECF No. 24 at 14. In either case, the report was produced years after the relevant
28 time period in this matter.

1 remand the case for additional evidence and finding or to award benefits. *Smolen*
 2 *v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The Court may award benefits if
 3 the record is fully developed and further administrative proceedings would serve
 4 no useful purpose. *Id.* Remand is appropriate when additional administrative
 5 proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th
 6 Cir. 1989). In this case, as indicated above, further development is necessary to
 7 remedy defects and for a proper determination to be made.

8 On remand, the ALJ shall reassess Plaintiff's credibility, reconsider Dr.
 9 Halma's October 2009 report and, if deemed necessary, contact Dr. Halma to
 10 determine whether it is Dr. Halma's opinion that Plaintiff would have missed four
 11 or more days of work per month due to medical impairments during the relevant
 12 time period. The ALJ shall reassess Plaintiff's RFC, taking into consideration Dr.
 13 Halma's October 2009 report, Tr. 328-329, the opinions of Drs. Brown and
 14 Boonpongmanee, and all other medical evidence of record relevant to Plaintiff's
 15 claim for disability benefits. The ALJ shall elicit the testimony of a medical expert
 16 at a new administrative hearing to assist the ALJ in formulating a new RFC
 17 determination. Plaintiff's new RFC assessment should be presented to a vocational
 18 expert to determine if Plaintiff is capable of performing her past relevant work as a
 19 sales clerk, bartender, waitress, or cashier or any other work existing in sufficient
 20 numbers in the national economy.

21 Accordingly, **IT IS ORDERED:**

- 22 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
 23 **GRANTED, in part.**
- 24 2. Defendant's Motion for Remand, **ECF No. 24**, is **GRANTED.**
- 25 3. The matter is **REMANDED** to the Commissioner for additional
 26 proceedings consistent with this order.
- 27 4. An application for attorney fees may be filed by separate motion.

28 ///

1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. Judgment shall be entered in favor of
3 **PLAINTIFF** and the file shall be **CLOSED**.

4 DATED November 1, 2013.



A handwritten signature in black ink, appearing to be "M" followed by a stylized flourish.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE